STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 6, 2000
v MICHAEL E. BELL, Defendant-Appellant.	No. 209269 Recorder's Court LC No. 95-004885

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v MICHAEL E. BELL, Defendant-Appellant.	No. 209270 Recorder's Court LC No. 97-001258

Before: Cavanagh, P.J., and Saad and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury in two separate cases of a total of three counts of first-degree felony murder, MCL 750.316; MSA 28.548, and one count of solicitation to commit arson of a dwelling house, MCL 750.157b; MSA 28.354(2) and MCL 750.72; MSA 28.267. He was sentenced to three terms of life imprisonment without parole for the first-degree murder convictions and twelve to twenty years' imprisonment for the solicitation to commit arson conviction, all sentences to be served concurrently. He appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting the statement of a codefendant, Matthew Roberts, which implicated defendant in the charged crime. Defendant argues that the statement is inadmissible under the Michigan Rules of Evidence and that admission of the statement also violated his rights under the Confrontation Clause, US Const, A VI; Const 1963, art 1, § 20. However, defendant

predicates his argument on federal case law interpreting and applying the Federal Rules of Evidence. In this case, the court admitted the statement under MRE 804(b)(3), as construed by our Supreme Court in *People v Poole*, 444 Mich 151, 159-162; 506 NW2d 505 (1993).

In *Poole*, the Supreme Court held that, in certain situations, a codefendant's statement may be admitted against a non-declarant defendant as substantive evidence under MRE 804(b)(3). We are bound to follow our Supreme Court's decision in *Poole* on this subject, notwithstanding contrary federal authority. *People v Beasley*, 239 Mich App 548, 551, 556; 609 NW2d 581 (2000). We are also bound to follow *Poole*, notwithstanding the decision in *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999), because *Lilly* is a plurality opinion and, therefore, is not binding precedent. *Beasley, supra* at 559. See also *People v Schutte*, 240 Mich App 713, 717 n 4; 613 NW2d 370 (2000). Accordingly, defendant has not shown that the trial court erred in admitting codefendant Roberts' statement.

Defendant claims that there was insufficient evidence of malice to convict him of felony murder. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). We disagree. The malice necessary to support a conviction for felony-murder consists of "the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result." *People v Nowack*, ___ Mich ___; 614 NW2d 78, 821 (2000), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999). A jury cannot be required to find the element of malice for felony murder simply from a defendant's mere intention to commit the underlying felony. Instead, the jury may use the commission of the felony as a factor to find malice. *People v Kelly*, 423 Mich 261, 273; 378 NW2d 365 (1985). The facts and circumstances surrounding the killing itself may establish malice through inferences that can be drawn from that evidence. *Nowack, supra*. "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Carines, supra* at 759. The jury may infer malice only where all of the facts and circumstances involved in the perpetration of the felony committed warrant drawing that inference. *People v Dumas*, 454 Mich 390, 408; 563 NW2d 31 (1997).

The, evidence showed that defendant desired to set the victims' house on fire because he wanted one of the victims, Reverend Williams, out of the way so that defendant could expand his drug trafficking business, and that defendant had arranged for Roberts to commit the crime. Viewed most favorably to the prosecution, this evidence was sufficient to allow the jury to infer the element of malice. *Wolfe, supra* at 514-515. See also *People v McKenzie*, 206 Mich App 425, 428-429; 522 NW2d 661 (1994).

Defendant avers that the trial court's supplemental jury instructions on aiding and abetting were erroneous. Because defendant did not object to the court's instructions, we review this issue for plain error. *Carines, supra* at 761-767.

The trial court's supplemental instructions did not fully include instructions on aiding and abetting. However, the supplemental instructions were given in response to a jury note requesting reinstruction on first-degree felony murder and second-degree murder only. A trial court does not

abuse its discretion when it does not reinstruct on areas not included in a jury's request for additional instructions. *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). In its general jury charge, the court instructed on aiding and abetting in accordance with CJI2d 16.4(7), and the court incorporated its earlier instructions on aiding and abetting when it gave the jury the supplemental instructions. When viewed as a whole, it is apparent that the jury was properly instructed on aiding and abetting, and that the court's supplemental instructions did not contradict its earlier instructions. It must be presumed that the jury followed the court's earlier instructions, as the court reminded the jury to do. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Therefore, plain error has not been shown. *Carines, supra*.

Defendant argues that the trial court erred by failing to sua sponte give a cautionary instruction on how to evaluate an addict's testimony. While our Supreme Court and this Court have both acknowledged that such an instruction may be appropriate in a given case, any duty to instruct arises only upon request and, absent a request, a trial court is under no duty to sua sponte provide an instruction on addict testimony. *People v Atkins*, 397 Mich 163, 170; 243 NW2d 292 (1976); *People v Griffin*, 235 Mich App 27, 40; 597 NW2d 176 (1999). Indeed, as our Supreme Court observed in *Atkins, supra* at 170-171, "[f]ocusing special attention or particular suspicion on a witness or class of witnesses can be a risky business[,]" and, therefore, both sides should have an opportunity to address this issue before the court gives such an instruction. Here, defendant did not request a cautionary instruction on addict testimony. Further, it is apparent that the jury was aware of the fact that Roberts was a drug addict and that he faced criminal charges for this crime when he gave his statement. Accordingly, plain error has not been shown. *Carines, supra*.

Defendant claims that the trial court abused its discretion when it admitted evidence of his involvement in drug trafficking. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Hendrickson*, 549 Mich 229, 235' 586 NW2d 906 (1998).

Evidence of other crimes, wrongs or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v Layher*, 238 Mich App 573, 585; 607 NW2d 98 (2000), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Motive and intent are two proper purposes for admitting other-acts evidence under MRE 404(b), if relevant. *People v Sabin (After Remand)*, ___ Mich ___; 614 NW2d 888, 901 (2000).

Also, the common law continues to recognize that the entire res gestae of a crime may be admitted without regard to MRE 404(b), even if the facts show that other crimes were committed. In *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996), our Supreme Court reaffirmed the rule that evidence of other crimes or bad acts is admissible, without regard to MRE 404(b), where the evidence is part of the complete story of the case or is directly related to the circumstances of the crime.

> "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the

other or explains the circumstances of the crime." [*Sholl, supra* at 742, quoting *State v Villavicencio*, 95 Ariz 199; 388 P2d 245 (1964).]

We believe that the evidence of defendant's drug trafficking was relevant and admissible under the res gestae exception to MRE 404(b). *Sholl, supra*. Even if MRE 404(b) is implicated, however, we are satisfied that the evidence was properly admitted under that rule. The evidence indicated that the victims' house was targeted because one of the victims, Reverend Williams, was actively involved in cleaning up the neighborhood from drugs, whereas defendant was a major drug dealer who wanted to expand his business in the neighborhood. The prosecutor relied on the evidence of defendant's drug activities to argue that defendant had a motive to commit the charged crime, a proper purpose under MRE 404(b). Finally, defendant has not shown that the probative value of the evidence was outweighed by the danger of unfair prejudice. Thus, the trial court did not abuse its discretion in admitting the evidence.

Defendant argues that his convictions in L Ct No 95-004885 must be reversed because he was never arraigned on the information in that case after it was remanded to the district court for a second preliminary examination. We are unable to determine from the record whether a formal arraignment on the information was ever conducted. Under the circumstances of this case, however, we conclude that any error was harmless. *People v Belanger*, 454 Mich 571, 576; 563 NW2d 665 (1997).

Defendant does not dispute that he was arraigned on the information in L Ct No 97-001258, which occurred after these cases were consolidated for trial. By that time, the prosecution had filed a new amended information that incorporated all of the charges in the two cases. Based on defendant's arraignment in L Ct No 97-001258, we are satisfied that defendant had fair notice of the charges against him. Defendant's reliance on *People v Thomason*, 173 Mich App 812, 814-816; 434 NW2d 456 (1988), is misplaced, inasmuch as *Thomason* involved the failure to arraign a defendant on the warrant, not the information. While reversal may be required where a defendant is not arraigned on the warrant, we do not believe that automatic reversal is required for failure to arraign a defendant on the information. Compare MCR 6.104(E) to MCR 6.113(B). See also *People v Weeks*, 165 Mich 362, 364; 130 NW 697 (1911).

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter